

January 26, 1999



OFFICE OF THE
ATTORNEY GENERAL
STATE OF TEXAS

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JOHN CORNYN
Attorney General

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Ms. Ann Diamond
Chief of Litigation
Assistant District Attorney
Tarrant County
401 West Belknap
Fort Worth, Texas 75196-0201

OR99-0237

Dear Ms. Diamond:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 121326.

The Tarrant County District Attorney's Office (the "district attorney") received an open records request for the following information:

Reports concerning the sexual harassment investigations of [four named individuals].¹ Please include a summary of the investigation, as well as any witness statements and the resulting disciplinary action. [Footnote added.]

You contend that the requested information is excepted from required public disclosure under a variety of legal theories, including specific exceptions to disclosure listed in subchapter C of chapter 552 of the Government Code. You raised these arguments in your correspondence to this office dated October 20, 1998. We note, however, that the postmark on this correspondence bears the date of October 26, 1998. Because the district attorney received the open records request on October 6, 1998, we conclude that your arguments for non-disclosure contained in your October 20 letter were not timely made. *See* Gov't Code § 552.301. On the other hand, your correspondence to this office dated October 21, 1998, bears the

¹You inform us that the district attorney possesses no responsive records with regard to one of the named individuals. The district attorney therefore need not comply with that aspect of the request.

postmark of that same date, and therefore constitutes a timely submission of arguments.² Consequently, this office will consider only those arguments for non-disclosure that you made in your October 21, 1998 letter, as well as any mandatory confidentiality provisions of law that apply to the records at issue. All other exceptions to disclosure that you raised in your October 20, 1998 correspondence are deemed to be waived.

We first discuss the extent to which the requested information is made confidential by statutory law, and thus must be withheld from the public pursuant to section 552.101 of the Government Code.³ You specifically inquire as to whether a Texas Workers' Compensation Appeal decision, which you state may be responsive to the open records request, is made confidential by law. In Open Records Decision No. 476 at 5 (1987), this office concluded that the

names of employers and employees who file appeals in unemployment compensation cases undoubtedly are within the definition of "claim information" set forth in the [federal] regulations, because their disclosure may well reveal that the employee involved in the appeal "is receiving, has received, or has applied for unemployment compensation." 20 C.F.R. § 603.2(c)(1). Accordingly, the federal regulations prohibit the commission from disclosing these names to this requestor.

Because the appeal decision cannot be released in a manner that will not reveal the identity of the employee who filed the appeal, we conclude that this document must be withheld in its entirety pursuant to section 552.101 of the Government Code in conjunction with chapter 603 of title 20 of the Code of Federal Regulations. *See generally* Open Records Decision No. 476 (1987).

You also inquire whether an EEOC "Dismissal and Notice of Rights" decision held by the district attorney is made confidential under federal law for purposes of section 552.101 of the Government Code. Although employees of the EEOC are prohibited from releasing any information pertaining to a discrimination complaint unless a complainant files a lawsuit to remedy the discriminatory practice, *see* 42 U.S.C. § 2000e-8(e), this prohibition does not extend to an employer's disclosure of information relating to a claim of employment discrimination. Open

²You inform us that for purposes of calculating the deadline of ten business days for submitting a request for an open records decision, the Tarrant County Commissioner's Court has designated October 12 as a county holiday in observance of Columbus Day.

³Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, *statutory*, or by judicial decision." (Emphasis added.)

Records Decision No. 155 at 2 (1977). Consequently, the district attorney may not withhold this record except to the extent discussed below.

You next contend that the district attorney may withhold all of the requested information pursuant to section 552.103 of the Government Code. To secure the protection of section 552.103, a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 at 1 (1991). The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 at 4 (1986) and authorities cited therein. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.*

In support of your section 552.103 claim, you have submitted to this office a letter from an attorney representing one of the named individuals who was the subject of one of the investigations. In his letter, the attorney informs the district attorney that his client “is planning to bring litigation against the District Attorney’s Office for libel, slander, denial of due process of law, and failure to investigate other employees for defamation statements.” Given this notice, we believe that you have demonstrated the applicability of section 552.103 to the records pertaining to the investigation of the attorney’s client.

In concluding that section 552.103 applies to the sexual harassment investigation discussed above, we note that one of the documents pertaining to that investigation, namely the “Disciplinary Memo,” is addressed to and presumably has been previously viewed by the individual under investigation. Absent special circumstances, once information has been obtained by all parties to the litigation, either through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Consequently, the district attorney may not withhold this document pursuant to section 552.103. Assuming this individual has not viewed the witnesses statements gathered during the course of the investigation, we conclude that the district attorney may withhold these documents in their entirety pursuant to section 552.103.

On the other hand, you have not met your burden of demonstrating how the records pertaining to any of the remaining investigations relate to this litigation claim. *See* Open Records Decision No. 222 (1979) (litigation exception not applicable absent showing of direct relationship between requested information and pending or contemplated litigation). However, you have also provided this office with a copy of a notice of complaint that the district attorney received from the Texas Commission on Human Rights (the “commission”) under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5. The notice is in regard to a complaint filed by a former employee not named in the open records request. Although you have not

submitted to this office a copy of the civil rights complaint, it is our understanding that the former employee has alleged gender and racial discrimination by the district attorney.

For purposes of section 552.103, the filing of a civil rights complaint with the commission constitutes evidence that the likelihood of litigation against the district attorney is more than mere conjecture. *See* Open Records Decision No. 386 (1983). However, in this instance you have not made the requisite showing that the requested information relates to the allegations made by this complainant. We therefore conclude that the district attorney may not withhold any of the remaining requested records pursuant to section 552.103.

We next discuss the applicability of common-law privacy, as incorporated into section 552.101, to the records pertaining to the remaining two investigations. In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. *See also Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) (common-law privacy protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and is of no legitimate concern to the public). The investigatory files at issue in *Ellen* contained individual witness and victim statements, an affidavit given by the individual accused of the misconduct in response to the allegations, and the conclusions of the board of inquiry that conducted the investigation.

The court held that the names of witnesses and their detailed affidavits regarding allegations of sexual harassment was exactly the kind of information specifically excluded from disclosure under the privacy doctrine as described in *Industrial Foundation. Ellen, supra*, at 525. However, the court ordered the release of the affidavit of the person under investigation, in part because it ruled that he had waived any privacy interest he may have had in the information by publishing a detailed letter explaining his actions and state of mind at the time of his forced resignation. *Id.* The *Ellen* court also ordered the disclosure of the summary of the investigation with the identities of the victims and witnesses deleted from the documents, noting that the public interest in the matter was sufficiently served by disclosure of such documents and that in that particular instance "the public [did] not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements." *Id.*

In this instance, this office feels compelled to follow the *Ellen* decision with regard to victims' and witnesses' identities; we have marked in brackets the types of information the district must withhold to protect the identities of these individuals. *See Star Telegram, Inc. v. Doe*, 915 S.W.2d 471, 474-475 (Tex. 1995). However, the court in *Ellen* did not reach the issue of whether the public employee who was

accused of the harassment had any inherent right of privacy to his identity or the content of his statement and we decline to extend such protection to these individuals here. We believe there is a legitimate public interest in the identity of public employees accused of sexual harassment in the workplace. *See, e.g.,* Open Records Decision Nos. 484 (1987), 400 (1983). Consequently, none of the remaining information pertaining to the investigations, including all references to the harassers' names, is protected by common-law privacy because of the clear public interest in this information. *Cf.* Open Records Decision No. 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees).

We also note that some of the information at issue may be protected from public disclosure pursuant to section 552.117 of the Government Code. Section 552.117(1) excepts from disclosure public employees' home telephone numbers, home addresses, social security numbers, and information revealing whether the employee has family members, but only if the employee requested that these types of information be kept confidential in accordance with section 552.024 of the Government Code. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Assuming each respective employee elected to make this information confidential prior to the date on which the district attorney received the open records request, the district attorney must withhold the information we have marked in brackets pursuant to section 552.117.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Ruth H. Soucy', with a stylized flourish at the end.

Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/RWP/nc

Ref.: ID# 121326

Enclosures: Submitted documents

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